Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as aniended by tlie Cable Television Consumer Protection and Competition Act of 1992	)))))	MB Docket No 05-311

COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS CONSORTIUM, THE CITY OF COLORADO SPRINGS, COLORADO AND THE CITY OF TACOMA, WASHINGTON IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

The Greater Metro Telecommunications Consortium ("GMTC"), the City of Colorado Springs, Colorado, and the City of Tacoma, Washington (collectively, the "Local Governments"), submit these comments in response to the Further Notice of Proposed Rulemaking, released March 5,2007, in the above captioned rulemaking ("Further Notice")

I. INTRODUCTION

1 GMTC is an Intergovernniental Agency formed pursuant to Colorado law and is coniprised of 31 municipalities and counties in the Denver metro region [1] Individual GMTC members are the local franchising authorities for each of their jurisdictions The City of Colorado Springs is the local franchising authority for its municipality arid the City of Tacoma is the franchising authority for its municipality In each of the local governments, Comcast is the

[1] The individual jurisdictions that are members of GMTC are Adams County, Arapahoe County, City of Arvada, City of Aurora, City of Brighton, City and County of Broomfield, Town of Castle Rock, City of Centennial, City of Cherry Hills Village, Town of Columbine Valley, City of Commerce City, City and County of Denver, Douglas County, City of Edgewater, City of Englewood, 'Town of Erie, City of Federal Heights, City of Glendale, City of Golden, City of Greenwood Village, Jefferson County, City of Lakewood, City of Littleton, City of Lone Tree, City of Louisville, City of Northglenn, Town of Parker, City of Sheridan, City of Thornton, City of Westminster, City of Wheat Ridge.

incumbent cable operator. Other cable operators provide services in portions of some of the local governments, including US Cable, Champion Broadband, Qwest, and Click! Network.

The individual jurisdictions that comprise tlie local governments have franchise agreements with each of their cable operators. Those franchises have expiration dates that range from June 2007 through May 2019.

2. The Local Governments support and adopt tlie comments of the National Association of Telecommunications Officers and Advisors (“NATOA”), the National League of Cities (“NLC”), the National Association of Counties (“NACo”), the United States Conference of Mayors (“USCM”), the Alliance for Community Media (“ACM”), and tlie Alliance for Communications Democracy (“ACD”), filed in response to tlie Further Notice.

3. The Local Governments oppose the Further Notice‘s tentative conclusion’ that the findings made in tlie FCC’s March 5, 2007, Order (“Order“) in this proceeding should apply to incumbent cable operators, whether at the time of renewal of those operators’ current franchises, or thereafter. This proceeding is based on Section 621(a)(1) of tlie Communications Act, 47 U.S.C. § 541(a)(1), and the rulings adopted in the Order are specifically, and entirely, directed at “facilitat[ing] and expedit[ing] entry of new cable competitors into the market for the delivery of video programming, and accelerat[ing] broadband deployment.”[3]

4. The Local Governments disagree with the rulings in tlie Order, both on tlie grounds that tlie FCC lacks tlie legal authority to adopt them and on the grounds that those rulings are unnecessary to promote competition, violate tlie Cable Act’s goal of ensuring that a cable system is “responsive to the needs and interests of the local community,” 47 U.S.C. § 521(2), and are in conflict with several other provisions of the Cable Act. But even assuming,

[2] Order and Further Notice at ¶ 140
[3] Id., at ¶ 1

for tlie *sake* of argument, that the rulings in the Order are valid, they cannot, and should not, be applied to incumbent cable operators, By its terms, tlie "unreasonable refusal" provisions of Section 621(a)(1) apply to "additional competitive franchise[s]," not to incumbent cable operators., Those operators are by definition already in the market and tlieir future franchise terms and conditions are governed by tlie franchise renewal provisions of Section 626 (47 U.S.C. § 546), and not Section 621(a)(1).

II. SPECIFIC ISSUES ARISING OUT OF THE ORDER

A. PEG Channels and Support

5. The Order states that a local franchising authority may not impose requirements for PEG support "in excess of the incumbent cable operator's obligations."[4] Applying this directive to incumbent cable operators will have tlie affect of freezing PEG channels and support at current levels, and never allowing for modification to meet local needs. Such a result would be contrary to the Cable Act. At the time of franchise renewal, franchising authorities have a statutory right to assess community needs, and negotiate new franchise agreements to meet tlie demonstrated local needs *at that point in time*.[5] Pursuant to tlie Order, a competitive provider cannot be required to provide more in the way of PEG channels and support than is currently provided by the incumbent operator. If tlie same rule applied to incumbents, then at tlie time of renewal, the incumbent could demand that no additional PEG requirements be imposed. Again, this result clearly conflicts with the authority granted by Congress to obtain a franchise that provides for PEG support to meet local cable related needs.[6]

6. Indeed, the Local Governments have a demonstrated history of modifying franchise obligations regarding PEG channels and PEG support in order to meet the existing

[4] Id, at ¶ 120
[5] 47 U S.C Sec 546
[6] Id

local needs in franchise renewals. In their last franchise renewals tlie cities of Greenwood Village (2001), Broomfield (2003), Englewood (2002), Northglenn (2001) and Arvada (1995), Colorado, all were able to negotiate for the ability to activate additional access channels, which were not available in the prior franchise, in order to meet the demonstrated conmiunity needs *at that time*. In some communities, the local franchising authority has agreed to *reduce* tlie number of PEG channels available to the community – again, based upon local needs at tlie time of renewal negotiations.,' The effect of the Commission's Order will be that communities will have no incentive to ever reduce the number of access channels despite community needs, because when tlie need changes again, there will be no mechanism to meet those needs with additional channel capacity.,

7. Communities have had the ability to address local PEG needs at the time of renewal through financial contributions. When the City of Thornton, Colorado, negotiated a franchise renewal with AT&T Broadband in 2000, it was facing tlie closure of a studio that had been provided by the cable operator pursuant to a franchise agreement that preceded the 1992 amendments to tlie Cable Act. As a result of a demonstrated City investment in access programming, and to meet local needs, AT&T provided a grant of $300,000 to assist tlie City in developing its own studio. Those needs, adequately addressed in 2000, will not be tlie same needs that must he addressed when the franchise is renewed in 2012.

8. The City of Louisville, Colorado, received financial support from Comcast in its 2006 renewal to address capital equipment upgrades for the City's government access programming, as well as to address capital equipment and studio needs of the City's designated

[7] In 2006, when negotiating a renewal of its 1995 franchise, Louisville, Colorado a p e d to reduce the total number ofpossible access channels from 5 to 4, based upon community needs at that time. In 2004, when negotiating a renewal **of** its 1989 franchise, Erie, Colorado agreed to reduce its access channels from a guaranteed 3 channels, to 2 channels with the possibility of a third channel being activated if certain use criteria are met.

access provider for public access, which was also going to lose its studio after the prior franchise expired. When the current franchise expires in 2013, no one knows what the status of government and public access programming in Louisville will be. The Commission should not mandate that a community's ability to meet needs at a future date will be limited to the consideration negotiated to meet those needs in the past.

9. At the time of Colorado Springs' franchise renewal with Adelphia in 2000, the community was not interested in a franchise fee, and instead, negotiated a $4 million investment in construction of an institutional network, and a technology grant of $1.20 per subscriber per month, to generate revenue for capital equipment costs for access programming operations of the City and its designated access provider fox education access programming, the Southern Colorado Educational Television Consortium. There is no good reason – legal or logical – that supports restricting Colorado Springs from ever deciding that it may wish to begin imposing a franchise fee consistent with federal law, and perhaps reduce the consideration it receives for PEG support.

10. When Tacoma negotiated its franchise with TCI (now Coincast) in 1998, it included a provision that TCI provide a cash contribution of $450,000 for hard-wired origination points. No community would propose to negotiate for benefits that it does not need, yet by requiring all future franchises to include no more support than existing franchises, the Order suggests that cities like Tacoma should negotiate for items that it may not truly need, in order to be consistent with the Commission's directive.

11. If applied to incumbents, the Order will lock in the current level of PEG support, frustrating the intent of the Cable Act to allow franchises to meet local cable-related needs at a given point in time.

B. Franchise Fee Revenue

12. The Order made a number of findings that, if applied to incumbents, will cause substantial financial harm to local governments nationwide – namely, that tlie value of in-kind contributions must be credited against the five percent franchise fee cap.[8] For years, the Cable Act has been understood to allow franchising authorities to collect franchise fees totaling five percent of gross revenues, together with additional consideration to meet local cable-related needs such as institutional networks ("I-Net"), emergency alert systems, and free cable service to government buildings, including schools and libraries. The Commission did not cite one legal authority supporting its position that in-kind services such as free service to schools and libraries should be credited against tlie franchise fee obligation.

13. Many of tlie Local Governments herein receive free cable service at a variety of government buildings, and some benefit from institutional networks that have been constructed by cable operators and/or utilize discounted services provided by cable operators. The GMTC communities in particular have a region wide emergency alert system facilitated through each jurisdiction's cable system, serving vital public safety needs.

14. Regarding complimentary cable service to government buildings/schools/libraries, the extent of use ranges from two buildings in Castle Rock, Colorado; three buildings in Arapahoe County and Erie, Colorado; 17 buildings in Northglenn, Colorado; 25 buildings in Broomfield, Colorado; 61 buildings in Arvada, Colorado; 116 buildings in Tacoma, Washington; approximately 155 buildings in Aurora and Colorado Springs, Colorado; to 330 buildings in Denver, Colorado. There has never been a challenge in any of these jurisdictioiis asserting that tlie value of these services should be taken as a credit against franchise fees. Franchise fee revenues are general fund monies. In most ,jurisdictions these

[8] Order and Further Notice at ¶ 104

monies are used to pay for essential services lilce public safety, code enforcement, parks and streets maintenance. The loss of these revenues would be devastating to local operations. Indeed, rather than be forced to reduce essential services that might be necessitated by the loss of these franchise fee revenues, local governments would expect to cut tlie use of tlie cable services instead – forced by Commission fiat to give away a community cable-related need previously negotiated in good faith, and completely consistent with the Cable Act.

15. Franchise renewal negotiations in a number of the Local Government jurisdictions have included cable operator agreements to construct a local government I-Net for tlie incremental additional cost incurred by the cable operator during cable system upgrade construction. These agreements often include provision of communications services by the cable operator to the local ,jurisdiction at a reduced rate. While it is difficult to determine the actual value of tlie I-Net provided, these agreements have allowed for I-Net connectivity at a fraction of tlie cost that the jurisdictions would have otherwise paid, *and* at no net cost to tlie cable operator.

16. Colorado Springs received a $4 million grant to assist in tlie construction of its I-Net. Tacoma's I-Net was constructed as part of its franchise with Click! Network. Utilization of services over tlie I-Net saves the taxpayers of Tacoma over $825,000 per year, compared to tlie cost of buying comparable services over T-1 lines. AT&T Broadband constructed an I-Net for Deliver at the time of its cable system upgrade, for which Denver paid the incremental cost of approximately $1.2 million – significantly less than what the City would have paid if it constructed a comparable I-Net independently. Denver pays maintenance and lease costs to Comcast of about $120,000 per year, and has been able to discontinue some vendor contracts for telephone and data service (saving Denver taxpayers approximately $300,000 per year). Arvada has paid lease rates to Comcast for its I-Net of approximately $430,000 since 2001.

17. Due to the variety of tlie ways in which I-Nets have been provided, constructed, leased, and utilized, it would be almost impossible to determine a single way to "value" this franchise benefit as a credit against franchise fees. The Commission has taken a franchise issue that has always been interpreted by both localities and cable operators as separate from tlie franchise fee, and contrary to the stated intent of the Order, has set tlie table for years of uncertainty as tlie issue of how to value I-Nets is litigated. This was clearly not the intent of Congress. If tlie provisions of the Order are extended to incumbents, then in the future, local ,jurisdictions will be forced to choose between substantial reduction in franchise fee revenues and the loss of the ability to benefit from an affordable I-Net. The Commission's action in the Order, and the extension of that action to incumbents, will do nothing for increased deployment of broadband infrastructure. It will, however, result in less broadband connectivity for local communities.

C. Build Out Requirements

18. The Order determined that some buildout requirements may constitute unreasonable barriers to entry by competitive providers.[9] The Further Notice aslcs whether the Order should apply to incumbents at tlie time of renewal, and with respect to buildout issues, tlie answer is clearly "no." Even assuming that tlie Order's buildout findings are lawful when applied to new entrants,'' those findings should not be applied to incumbents. Every legal and policy ,justification offered in the Order for its buildout findings (i.e., the supposed handicaps faced by new entrants attempting to gain market share in a community with an established incumbent cable operator) is, on its face, inapplicable to incumbent cable operators. Moreover, if tlie buildout findings were applied to incumbents at renewal, that would likely mean that incumbents

[9] Id, at ¶¶ 82, 87, 89, 90, 91

[10] The Local Governments do not concede this point, but assume it is correct for the purposes of the Further Notice

would never have to expand their current service footprint, and in some cases, might be permitted to withdraw from areas they currently serve. Tlie result would be to leave some areas completely unserved, a result that is clearly inconsistent with the Connnission's stated goal of promoting broadband service availability

D. Local Customer Service Standards

19. Tlie Local Governments strongly endorse tlie Further Notice's tentative conclusion that Section 632(d)(2) (47 U.S.C. § 552(d)(2)) bars the FCC from "prempt[ing] state or local customer service laws that exceed the Commission's standards," and from "preventing LFAs and cable operators from agreeing to more stringent [customer service] standards" than tlie FCC's.[11]

20. The GMTC jurisdictions have adopted local customer service standards and have been able to quickly and efficiently address customer service complaints. Tacoma and Colorado Springs enforce tlie FCC's standards. Often times, simply knowing who to call that is liiglier up in tlie cable operator's chain of command is all that it takes to assist consumers in resolving their issues. At tlie same time, the local standards address issues that have not been included in the FCC standards, like protection of a consumer's personally identifiable iriformation, and the ability to bypass an automatic voice response system and speak to a live customer representative within a reasonable period of time. For this reason, in metro Denver, Comcast customers who wish to speak to a live customer service representative can do so within 90 seconds of a call being connected, while satellite customers may experience wait times of 20 to 30 minutes, Local citizens benefit by these local regulations.

[11] Order and Further Notice **at** ¶ 142

E. Impact of Order on Franchise Renewal Negotiations

21. Contrary to tlie Commission's belief that tlie Order will "provide certainty to prospective marketplace participants,"" it is actually causing confusion and delay as it pertains to franchise renewals. Tacoma's franchises with its two cable operators expire in January 2009 (Comcast) and July 2008 (Click! Network). Both companies have told tlie City that they are not interested in pursuing renewal negotiations until such time as the full impact of the Order is known.

F. Preemption of Level Playing Field Requirements

22. The Order preempts level playing field requirements "that have been adopted by.. .local authorities."[13] At the outset, it should be noted that the Conmission incorrectly cited the GMTC's position in paragraph 47, note 169 and paragraph 138, note 471, when it cited GMTC as tlie source for the statement that "some LFAs impose level playing field requirements on new entrants even without a statutory, regulatory or contractual obligation to do so,"[14] and that a number of local authorities "have adopted' level playing field requirements,[15] To be clear, these requirements liave not been *adopted* in local law, and are not required by local regulation. They have, however, been *negotiated* as contractual provisions into existing franchise agreements. Indeed, despite tlie Commission's statement, a contractual obligation does exist in many GMTC community franchise agreements.

23. The Order states that "locally-mandated level-playing-field requirements" are deemed preempted.[16] While this direction would seem clear as it applies to locally adopted ordinances or regulations, it is not clear whether the Commission is asserting that obligations

"Id, at ¶ 130

[13] Id, at ¶ 138

[14] Id, at ¶ 47, n 169

[15] Id, at ¶ 138, n 471

[16] Id., at ¶ 138

contained in existing contracts (i.e., incumbent cable franchises) are now severed and invalid. The Commission has created the untenable situation where, in order to comply with the Order on this point when negotiating with a new entrant, a local franchising authority is exposing itself to a breach of contract claim by its incumbent cable operator.

24. **As** it applies to incumbents, the Conmission must clarify what it means by level playing field requirements. It described level playing field requirements in the Order as requiring francliises with "substantially the same terms imposed on tlie incumbent cable operator."[17] In response, in some Colorado ,jurisdictions, Comcast has now proposed a new form of level playing field requirement which permits local authorities to grant competitive franchises on ternis that may vary from the incumbent's agreement, but, to the extent that those terms are different, the incumbent is given the unilateral right to amend its franchise to incorporate the new competitor's terms. In essence, this is really a variation of a contractual level playing field obligation – one party to a contract insisting that the other party can not contract with a third party on different terms, without some negative impact to the local authority. The Commission needs to state clearly and unequivocally whether (1) all level playing field requirements are preempted, and if not, which remain valid; and (2) whether the preempted level playing field requirements are ,just those that a governmental body adopts as an ordinance or regulation; or *(3)* whether the Commission's Order is intended to preempt and invalidate *existing contractual provisions* in franchise agreements, thereby insulating local authorities from breach of contract claims by incumbent cable operators.

"Id

G. The Order's Suggestion that Local Officials Should Violate Their Oaths of Office

25. In his dissenting statement, Commissioner Adelstein notes that the Order is "breathtaking in its disrespect for our local and state government partners…"[18] Nowhere is this more apparent than in the Commission's discussion of the Charter provision of the City of Colorado Springs, which requires that any City franchise be submitted to local voters for approval.

26. It should come as no surprise to the Commission that local elected officials take an oath of office, whereby they swear to uphold the Constitution of the United States, their State Constitution, and their City Charter. These elected officials have *a legal obligation* to uphold the provisions of the City Charter until such time as the voters repeal it, or until a provision has been ruled invalid by a legal authority having jurisdiction over the City.

27. The Commission cites Colorado Springs' decision to uphold its Charter as "onerous," and chastises the City for enforcing its Charter despite the fact that "the Communications Act and federal case law deem this approach unlawful…"[19] In support of this directive that the Colorado Springs Mayor and City Council should have violated the City Charter, the Coinmission cites 47 U.S.C. Sec. 522(10) and 541, and *Qwest Broadband Services, Inc., v City of Boulder*, 151 F. Supp. 2d 1236 (D. Colo. 2001).

28. 47 U.S.C. Sec. 522(10) is the definition of "franchising authority," and reads "the term 'franchising authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise." Under Colorado law, as a home rule city, Colorado Springs citizens are empowered to determine how franchises are to be granted by that municipality. There is nothing in 522(10) that would suggest this is inappropriate, let alone illegal. Moreover,

[18] Id , at **page *98***
[19] Id, at ¶ 24, note 77

47 U.S.C. Sec. 541 does not prohibit or even address local voters authorizing their governing body to enter into franchise agreements pursuant to state and local law.

29. As the Commission well knows, a trial court decision is only legally binding on the parties to that case, and, indeed, the *Boulder* case was a trial court ruling. There is no appellate ruling that is legally binding on Colorado Springs with respect to its Charter provision.. While Colorado Springs is aware of the *Boulder* decision, and tlie analysis of the trial court in that case, the fact remains that the ruling is not legally binding upon Colorado Springs. Therefore, at the time the City informed Qwest that it would either need to take its franchise to a vote or, alternatively, file a declaratory judgment proceeding to obtain a determination of whether the Cable Act preempted tlie City's Charter provision requiring a vote, there was *no binding legal authority* that would .justify the Mayor and City Council's refusal to enforce a provision of the City Charter.,

30. To be sure, the Commission's ruling in the Order would appear to be a decision of a federal authority with sufficient reach to cover preemption of provisions of the voter approval requirement of tlie Colorado Springs Charter and others like it in other jurisdictions." If the Commission had simply ruled that the Cable Act preempted city charter provisions requiring franchise approval by local voters, while the City might disagree on the merits, it would limit its argument in response to the merits. However, the Commission stepped over tlie line when it misrepresented that there exists legal authority that would permit the Mayor and City Council to ignore a validly enacted provision of its City Charter. **A** federal agency should *never* criticize local elected officials for complying in good faith with their oaths of office,

[20] For the record, Colorado Springs does not believe the Commission has the legal authority to support the Order, but recognizes that that matter will be determined through the judicial process, and, until such time as the Order may be overturned, it appears to govern this situation

31. Finally on this point, it is interesting that the Commission's criticism of this election requirement was based upon its belief that to comply would amount to an unreasonable delay,[21] It should be noted that Qwest had an offer of a franchise agreement from Colorado Springs in the summer of 2006. It walked away from the franchise for reasons having nothing to do with the election requirement. Another competitive entrant, Falcon Broadband, entered into the same agreement as was offered to Qwest, was approved by the Colorado Springs voters in November 2006, and is now authorized to provide competitive cable services in the City Moreover, a second competitive entrant, PorchLight Communications, bas recently agreed to the same franchise, and was approved by Colorado Springs voters in April 3, 2007. The premise underlying the Commission's decision on this point is clearly wrong.

III. CONCLUSION

32. As it impacts competitive providers, there are serious legal infirmities in tlie directives of the Order. It would be an error to extend those problems to incumbents. That being said, there are two primary reasons why the Commission should not extend the Order to incumbents. First, the Commission's stated purpose underlying the Order was to facilitate competitive entry into the wireline video services market. Incumbent cable operators already exist in that market (arid do not require additional rules to facilitate their operations, as stated clearly by most cable industry commenters in the underlying proceeding). Second, Section 626 of the Cable Act, not Section 6.21, governs franchise renewals. Section 626 already sets specific timetables for franchise renewal, and other provisions which frame the parameters of rhe local process – provisions that are inconsistent with tlie Commission's directives in the Order. For these reasons, and to avoid tlie specific problems that will be imposed upon local franchising

[21] Id., at ¶ 24

authorities and the citizens they represent as articulated in these Comments, the Commission should refrain from extending the Order to incumbent cable operators

Respectfully submitted this 20th day of April 2007

THE GREATER METRO TELECOMMUNICATIONS CONSORTIUM, THE CITY OF COLORADO SPRINGS, COLORADO, AND THE CITY OF TACOMA, WASHINGTON

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